

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
REGION 8

INTERNATIONAL BROTHERHOOD OF)	CASE NO. 8-CD-133004
ELECTRICAL WORKERS, LOCAL NO. 71,)	
)	
<i>Charged Party – Labor Organization</i>)	
)	
and)	
)	
THOMPSON ELECTRIC, INC.)	
)	
<i>Charging Party – Employer,</i>)	
)	
and)	
)	
INTERNATIONAL UNION OF)	
OPERATING ENGINEERS, LOCAL NO. 18,)	
)	
<i>Party-in-Interest – (Intervenor)</i>)	
<i>Labor Organization</i>)	

THOMPSON ELECTRIC, INC.’S POST-HEARING BRIEF

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November 3, 2014

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I. INTRODUCTION.

This section 10(k) jurisdictional proceeding is yet another effort by the International Union of Operating Engineers Local No. 18 to claim as “its work” the operation of any construction equipment mobilized by tracks or tires.¹ Indeed, IOE Local 18’s never-ending 2014 campaign to extend its jurisdictional reach over Northeast Ohio construction projects is nothing new to the employer embroiled in this dispute – Thompson Electric, Inc. (“TEI”).²

The National Labor Relations Board’s statutory duty and authority to referee this inter-union dispute was largely uncontested at the October 22, 2014 hearing,³ and

¹ *Laborers Int’l. Union Local No. 265 (Henkels & McCoy)*, 2014 NLRB LEXIS 550 (July 14, 2014); *Int’l. Operating Engineers Local No. 18 (Donley’s, Inc.)*, 360 NLRB No. 113 (May 15, 2014); *Laborers Int’l. Union Local No. 860 (Ronyak Paving)*, 360 NLRB No. 40 (Feb. 12, 2014); *Laborers Int’l. Union Local No. 894 (Donley’s, Inc.)*, 360 NLRB No. 20 (Jan. 10, 2014); *Laborers Int’l. Union Local No. 265 (Henkels & McCoy)*, 360 NLRB No. 102 (May 5, 2014).

² *IBEW Local Union No. 71 (Thompson Electric)*, 354 NLRB 344 (2009).

³ “Before the Board may proceed with a determination of the dispute pursuant to Section 10(k) of the Act, it must be satisfied that there is reasonable cause to believe that Section 8(b)(4)(D) has been violated. This, in turn, requires a finding that: (1) there are competing claims to the disputed work between rival groups of employees, and (2) a labor organization has used proscribed means to enforce its claim to the work in dispute. Before addressing the merits of the dispute, the Board must also find that the parties have not agreed on a method of voluntary adjustment of the dispute”. *IBEW Local 357 (Western Diversified Elec.)*, 344 NLRB 1239, 1241 (2005). All of the parties to this action stipulated that there is no agreed-upon, voluntary adjustment procedure for resolving this dispute (Tr. 17). Furthermore, IBEW Local No. 71’s threat to use proscribed means to preserve its members’ work was again stipulated to by all of the parties (Tr. 24; Co. Exh. “E”). Testimony was elicited that on at least three different occasions, IOE Local No. 18 made a “competing claim” for the work in dispute, and IOE Local No. 18 failed to summon forth a single witness to dispute the testimony (Tr. 119-126). “The failure of a respondent to produce relevant evidence that is particularly under its control allows the trier of fact to draw an adverse inference that such evidence would not be favorable to it”. *Seedorff Masonry, Inc.*, 360 NLRB No. 107, *32 (2014) (citing, *International Automated Machines*, 285 NLRB 1122, 1123 (1987); *Martin Luther King, Sr. Nursing Center*, 231 NLRB 15, n. 1 (1977)).

notwithstanding Operating Engineers' Local No. 18's protestations to the contrary,⁴ there was undisputed, uncontroverted evidence that it made a competing claim for the work in dispute.

For the reasons detailed *infra*, the disputed work set forth in the notice of this Section 10(k) hearing as amended at the hearing⁵ should be assigned by the NLRB to IBEW Local No. 71, and an area-wide award should issue against Operating Engineers Local No. 18.⁶

II. STATEMENT OF FACTS.

A. Background.

Thompson Electric, Inc. ("TEI" or "Charging Party") is a 300-employee Munroe Falls, Ohio business engaged in residential, overhead transmission/distribution, and highway/roadway electrical installation and removal work (Tr. 45-47).⁷ For over twenty-

⁴ "Local 18 has made absolutely no claim to the work identified in Thompson Electric's ULP charge". (IOE Local No. 18 Opening Statement at Tr. 37). "Local 18 is not interested now, nor at any time with replacing any employees employed by Thompson Electric with members of the Operating Engineers". (*Id.* at p. 42). *But see, Id.* at Tr. 41: "Subsequently, in response to a telephone call initiated by Thompson Electric, a Local 18 representative made an offer to Thompson Electric to become signatory to the [IOE Local No. 18 collective bargaining] agreement, and as [counsel for Thompson Electric] indicated, in response to their inquiry that the – their employees could become employees of Anthony Allega and he could then pay them and pay the fringes [of Local No. 18]".

⁵ At the hearing, the formal notice of the work in dispute was amended without objection to include "other machinery" as well as augers affixed to line trucks, mini excavators and bobcats (Tr. 14).

⁶ *International Operating Engineers Local No. 18 (Donley's, Inc.)*, 360 NLRB No. 113 (May 15, 2014) (issuing area-wide award against IOE Local No. 18 with respect to the operation of construction forklifts and skid steers).

⁷ References to the October 22, 2014 hearing transcript shall be: (Tr. ____). Joint Stipulations submitted by the parties shall be referenced as: (Jt. Stip. 1, ¶ ____). The Company's exhibits are cited herein as: (Co. Exh. ____). The hearing exhibits of IBEW Local No. 71 are cited as: (IBEW Exh. ____). The exhibits of Party-In-Interest Operating Engineers Local No. 18 are referenced as: (IOE Exh. ____).

six years the International Brotherhood of Electrical Workers Local No. 71 has represented TEI's "outside" electrical crews through a non-NLRB section 8(f) collective bargaining relationship (Tr. 15-16, 46). For over twenty years, TEI has maintained a collective bargaining relationship with respect to highway lighting installation and removal, and traffic signalization installation and removal, in the Northeast Ohio area for the counties of Cuyahoga, Geauga, Lorain, Ashtabula, and Lake (Tr. 75; Co. Exh. "A", p. 20).⁸ The Northeast Ohio IBEW Local No. 71/TEI December 30, 2013 – December 18, 2014 collective bargaining agreement for highway lighting and signalization work sets forth job classifications and wage scales for General Foreman, Foreman, Traffic Signal/Lighting Journeymen Lineman, *Operators*, Groundmen, and *Equipment Operators* (Tr. 58-62; Co. Exh. "A", pp. 9-10). Additional collectively-bargained job classifications exist for Heavy Equipment Operators and Groundmen-Truck Drivers (Co. Exh. "A", pp. 18-19). The TEI/IBEW Local No. 71 Northeast Ohio highway construction labor contract also provides:

The subletting, assigning, or transfer by an individual Employer of any work in connection with electrical work to any person, firm, or corporation not recognizing the IBEW or one of its Local Unions as the collective bargaining representative of his employees on any electrical work in the jurisdiction of this or any other Local Union to be performed at the site of the construction, alternations, painting or repair of a building, structure, or other work, will be deemed in material breach of this Agreement.

⁸ At the hearing, the parties stipulated to existing jurisdiction under the National Labor Relations Act (Tr. 11-15). Thus, it was stipulated that TEI is engaged in interstate commerce, and receives gross revenues in excess of \$1,000,000.00 annually from in-state sources, and at least \$50,000.00 annually from out-of-state work and services (Tr. 11-12; Jt. Stip. 1, ¶ 4-6). Furthermore, it was stipulated that both Operating Engineers Local No. 18 and IBEW Local No. 71 are "labor organizations" within the meaning of the National Labor Relations Act (Tr. 13-14; Jt. Stip. 1, ¶¶ 1-2).

(Co. Exh. “A”, p. 6). The TEI/IBEW Local No. 71 negotiated highway contract⁹ also includes an apprenticeship training program for traffic signal and lighting install work, as well as a job site referral procedure with respect to out-of-work IBEW Local No. 71 members (*Id.* at pp. 13-14, 16; Tr. 140, 173-174). Finally, the collectively bargained TEI/IBEW Local No. 71 labor agreement allows for bargaining unit employees to work four, ten hour days without having to remit overtime for those hours exceeding 8 in a day (Tr. 61-62; Co. Exh. “A”, pp. 7-8).

TEI has never maintained a collective bargaining relationship with IOE Local No. 18 (Tr. 46). Nor has TEI ever been a member of the Labor Relations Division of the Ohio Contractor’s Association, the state-wide multi-employer bargaining group through which IOE Local No. 18 maintains a collective bargaining relationship for Ohio-jurisdictioned construction work (Tr. 46-47, 147; Co. Exh. “C”, *passim*).

B. The ODOT I-90 Lake County, Ohio Highway Construction Project.

On December 15, 2011, TEI entered into a highway lighting installation and removal subcontract with Anthony Allega, Inc. Cement Contractor (“Allega”) for an Ohio Department of Transportation (“ODOT”)-funded venture on I-90 in Lake County, Ohio (Tr. 49-50; Co. Exh. “D”). This highway construction project involved the addition of new traffic lanes, so existing highway light poles and light towers had to be removed in addition to re-locating and re-installing new light poles, towers and luminaires¹⁰ (Tr. 54, 56-57).

⁹ The TEI/IBEW Local No. 71 Northeast Ohio highway construction labor contract was negotiated by TEI’s assigned statutory agent, the National Electrical Contractors Association (Tr. 47-48). See, *Seedorff Masonry, Inc.*, 360 NLRB No. 107, *24 (2014) (discussing binding effect of associational labor contracts in §8(f) setting).

¹⁰ A “luminaire” is the actual light fixture that sits atop a highway lighting pole or tower (Tr. 54-55).

The light towers to be installed along I-90 in Lake County, Ohio are forty to sixty feet high, and the subcontracted TEI work included the construction of requisite light tower/pole foundations, trenching and installation of underground conduits, wiring and installation of highway luminaires, and the pulling and energization of all requisite electrical wiring (Tr. 51-55, 58-59). In order to perform its subcontract with Allega, TEI used IBEW Local No. 71 Foremen, Operators, Groundmen, and Journeymen Electricians (Tr. 58-62). Each of these IBEW Local No. 71 work classifications not only operates equipment necessary to perform the Allega/TEI subcontract, but also perform a host of manual labor tasks, including forming and pouring light tower and pole foundations, pulling electrical conduit, trenching small depth trenches,¹¹ and assembling conduit to protect underground electrical wires (Tr. 52-53, 58-59, 61-62, 80). In order to perform these tasks, TEI Foreman, Operators, Groundmen, and Traffic Signal/Lighting Journeymen operate numerous pieces of equipment, including skid steers (i.e. bobcats), mini-excavators, backhoes, bucket trucks with accompanying man lifts, and digger-derrick trucks affixed with augers that drill holes into soil as the foundation for light poles and towers (Tr. 52, 55-56). The digger-derrick also functions a crane to remove existing light poles and towers (Tr. 56-57). Each of the TEI-owned pieces of equipment are affixed with tires or tracks for mobilization (Tr. 52, 53, 56).

C. Operating Engineers Local 18's Efforts to Expand its Work Jurisdiction.

In May of 2014, IOE Local No. 18 Business Agent Jack Klopman appeared at the ODOT I-90 Lake County, Ohio highway construction project and began taking photographs of TEI's equipment that was on-site (Tr. 63, 116-117). A TEI Foreman, Mr. Mitch Smith, telephoned TEI's Chief Project Estimator Mr. Bob Mileski and reported the

¹¹ The highway lighting trenches are 2 feet in width, and 3 feet deep (Tr. 53).

picture-taking (Tr. 116-117). Business Agent Klopman was asked to leave the project, but stubbornly refused (Tr. 118). Mr. Mileski contacted Mr. Larry Thompson, the President of TEI, and reported “we have a problem on this job” as a result of the above-described IOE Local No. 18 conduct (Tr. 63).

Shortly thereafter, Mr. John Allega, of Anthony Allega Cement Contractor, Inc.¹² telephoned Bob Mileski and asked that he contact Mr. Don Taggart, the District Representative of IOE Local No. 18 (Tr. 65, 118-119). Again, Mr. Mileski informed TEI President Larry Thompson of his intentions to reach out to an IOE Local No. 18 representative and attempt to “rectify the situation” (Tr. 65). When Mr. Mileski of TEI telephoned Mr. Taggart of IOE Local No. 18, Taggart stated that IOE Local No. 18 has an existing collective bargaining agreement with Allega to operate all equipment (Tr. 119). During this telephone conversation, Mr. Taggart suggested that TEI IBEW Local No. 71 employees at the I-90 Lake County highway project renounce their employment with TEI, become employees of Anthony Allega Cement Contractor, Inc., and that the wages and fringe benefits under the Allega/IOE Local No. 18 collective bargaining agreement would then be remitted to the TEI workers for the remainder of the construction project (Tr. 120). Mr. Taggart bluntly informed Mr. Mileski: “Anything with wheels, tracks” “was under Local 18’s jurisdiction” (Tr. 121).

Later, on May 21, 2014, Mr. Taggart of IOE Local No. 18 left a voicemail message on the cellular telephone of Mr. Mileski (Tr. 121, Co. Exh. “I”).¹³ In that voicemail message, Mr. Taggart stated: “The concern is the fact that the electricians,

¹² The parties stipulated that Anthony Allega Cement Contractor, Inc. is a NLRA employer (Jt. Stip. 1, ¶¶ 7-9).

¹³ The complete text of the voicemail message left by Mr. Taggart on Mr. Mileski’s cell phone was played at the hearing (Tr. 123-124).

while they're getting they're – they are union in their own electrical union, they are not signatories to the Operating Engineers” (Tr. 123). Mr. Taggert additionally stated: “If we could get the [TEI] operators of the equipment that are on this project to go on a temporary basis on Allega’s payroll, where he could then pay fringes to the operator’s union under these guys, or these hours, these short hours, the guys that are running the booms, the trucks, the augers, the excavators or whatever they are going to be running, and if they could be paid the correct prevailing wage, then the terms and conditions [of the Allega/IOE Local 18 contract] would be satisfied” (Tr. 124). Later still, on May 27, 2014, Mr. Taggert of IOE Local No. 18 telephoned Mr. Mileski on Mr. Mileski’s cellular phone,¹⁴ and demanded TEI execute a project labor agreement for the ODOT I-90 Lake County highway construction project (Tr. 125). Mr. Mileski once again kept Larry Thompson informed of the conversations he was having with Mr. Taggert of IOE Local No. 18 (Tr. 66).

At the same time Mr. Mileski was being pressured by IOE Local No. 18 to either sign a collective bargaining agreement, or cede TEI workers to the payroll of Anthony Allega Cement Contractors wherein they would become Operating Engineer members, Mileski was being pressured by the General Contractor, Anthony Allega Cement Contractors (Tr. 67). Through a correspondence dated June 10, 2014, Mr. Anthony Allega notified Mr. Mileski that IOE Local No. 18 was intent on filing a grievance against Allega, but that Mr. Allega thought the whole matter was “...a jurisdictional dispute” (Tr. 67-68; Co. Exh. “M”, p. 1). Mr. Allega informed Mr. Mileski that if a IOE Local No. 18 grievance were filed and was successful, that he would be turning to TEI to recompense

¹⁴ The veracity of the multiple telephone calls placed by Mr. Taggert to Mr. Mileski was verified at the §10(k) hearing through cellular telephone bills (Co. Exhs. “F”, “G”).

Allega for any resulting damages or penalties (Co. Exh. "M", p. 2). In a later telephone conversation with Mr. Larry Thompson, Mr. Allega reiterated his Company's stance to deduct from progress payments owed and remitted to TEI any penalties or damages emanating from IOE Local No. 18's grievance (Tr. 73). At that juncture, Mr. Larry Thompson asked TEI Vice-President Bill Anderson to communicate with IBEW Local No. 71 Business Manager Mr. Bryan Stage in an effort to resolve the work jurisdictional dispute at the Lake County I-90 highway construction project (Tr. 69). On June 18, 2014, Mr. Anderson of TEI e-mailed¹⁵ to Mr. Stage of IBEW Local No. 71 a package containing the IOE Local No. 18 grievance against Allega, and Allega's June 10, 2014 correspondence to Mr. Mileski (Tr. 157-162; Co. Exhs. "M", "N"; IBEW Exhs. "1", "2").

D. IBEW Local No. 71's Threat.

Mr. Bryan Stage of IBEW Local No. 71 was both disturbed and concerned since Mr. Allega's suggested resolution to the intra-union dispute was "...[for TEI] to agree to replace your operator on the job, effective immediately, with a Local 18 operator until your portion of the project is completed for me" (Tr. 164-166; Co. Exh. "M", p. 2; IBEW Exh. "2", p. 12). Mr. Stage prepared and forwarded correspondence to Bill Anderson of TEI:

¹⁵ At the hearing, while cross-examining Mr. Larry Thompson, counsel for IOE Local No. 18 attempted to suggest that it was only the IOE Local No. 18 grievances that had been directed to Mr. Bryan Stage of IBEW Local No. 71 (Tr. 87, 90). Much to counsel's chagrin, Mr. Bryan Stage of IBEW Local No. 71 still had saved on his cellular telephone at the hearing the complete e-mail communication he had received from Bill Anderson of TEI, and that e-mail included the attachments not only of IOE Local 18's grievance against Allega, but the June 10, 2014 Allega correspondence to Mr. Mileski wherein Mr. Allega suggested "...to replace your [TEI] operator on the job, effective immediately, with a Local 18 operator until your portion of the project is completed for me" (Tr. 163; Co. Exh. "M", p. 2).

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS

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July 11, 2014

Mr. Bill Anderson
Vice President
Thompson Electric
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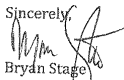
Re: ODOT 110499 IR-90 Lake County

Dear Mr. Anderson;

In reviewing the emails sent to me by Thompson Electric, concerning the above referenced project, it would seem, based on the letter dated June 10, 2014 to Mr. Bob Mileski, that Anthony Allega Cement Contractor, Inc. and Local 18 would favor Thompson Electric replace our IBEW Local 71 operator with an operator from Local 18.

As you well know Mr. Anderson, with Thompson Electric being a signatory party to the IBEW Local 71 Greater Cleveland Commercial Agreement the use of non IBEW members is strictly prohibited under Article II, Section 2.10 & 2.11. Furthermore, Article VIII, Section 8.02 addresses Referral Procedures, stating "The Union (IBEW 71) shall be the sole and exclusive source of referral of applicants for employment".

Please be advised that any breach and or violation of our collective bargaining agreement will result in grievances being filed and Picket Lines put up all along the project. IBEW Local 71 will do what's necessary to protect the integrity of Our Collective Bargaining Agreement and IBEW jobs.

Sincerely,

Bryan Stage
Business Manager
IBEW LU 71

Cc: Ron Snyder, Attorney

(Co. Exh. "E"). In addition, Mr. Stage had prepared, and purchased picketing signs against TEI in the event such would be needed:



(Tr. 168, IBEW Exh. "3").

The ODOT I-90 Lake County, Ohio highway construction project, and TEI's portion of subcontract on that project, is not yet completed (Tr. 116). Moreover, IOE

Local No. 18 has continued to press its “pay in lieu of work” grievance against Allega (Tr. 37; Co. Exh. “H”).

E. The Charge.

On July 18, 2014, TEI filed a Section 8(b)(4)(D) unfair labor practice charge against IBEW Local No. 71 (NLRB Exh. 1). Notice of the charge was issued to both IBEW Local No. 71 and IOE Local No. 18 (*Id.*). A formal notice of hearing issued on September 11, 2014, and again as revised on September 19, 2014 (*Id.*). This matter was heard in Cleveland, Ohio on October 22, 2014.

III. LEGAL ANALYSIS.

A. The Requisite Section 10(k) Elements.

“The Board may proceed with determining a dispute pursuant to Section 10(k) of the Act only if there was reasonable cause to believe that Section 8(b)(4)(D) has been violated. *Operating Engineers Local 150 (R&D Thiel)*, 345 NLRB 1137, 1139 (2005). This standard is met if there is reasonable cause to believe that there are competing claims for the disputed work between rival groups of employees, and a party has used proscribed means to enforce its claim to the work in dispute. Additionally, there must be a finding that the parties have not agreed on a method of voluntary adjustment of the dispute”. *Int’l. Operating Engineers Local 18 (Donley’s, Inc.)*, 360 NLRB No. 113, *15 (May 15, 2014). At the hearing, the parties stipulated to the absence of any agreed-upon voluntary adjustment procedure (Tr. 17; Jt. Stip. 1, ¶ 10).

What’s more, “a threat to strike and picket or force or require an employer to reassign disputed work constitutes reasonable cause to believe that Section 8(b)(4)(D) has been violated”. *Laborers Int’l. No. 76 (Albin Carlson Co.)*, 286 NLRB 698, 699-700

(1987). Accord, *Brockton Newspaper Guild (Enterprise Pub.)*, 275 NLRB 135, 136 (1985).¹⁶

Accordingly, the only issue for NLRB resolution is whether there were “competing claims” for the work in dispute, and on this score, the evidence was entirely unrebutted *since IOE Local 18 did not call a single witness to testify at the hearing!*

1. Competing Claims Were Made.

Plainly, IBEW Local No. 71 has made a *bona fide* claim for the work in dispute in this case. It is IBEW classified bargaining unit employees that operate all of the equipment involved to install the lighting at the ODOT I-90 Lake County, Ohio highway construction project (Tr. 58-62). Mere performance of the tasks and duties in question is a section 10(k) “claim” for the work. *Int’l. Operating Engineers Local No. 18 (Donley’s, Inc.)*, 360 NLRB No. 113, *16 (2014) (“Even absent this specific claim, the performance of the disputed work by Laborers’ represented employees at all of the projects here constitutes evidence of a claim for the work”). Accord, *Seafarers Dist. N.M.U. (Luedtke Engineering)*, 355 NLRB 302, 303 (2010). Moreover, the letter penned by IBEW Local No. 71 Business Manager Bryan Stage, threatening to picket if the work in question were surrendered to IOE Local No. 18, was yet another legally-cognizable claim for the work (Co. Exh. “E”).

¹⁶ At the hearing, counsel for IOE Local No. 18 noted the no-strike pledge contained in the IBEW Local No. 71/TEI collective bargaining agreement (Tr. 112). “It is well established that ‘[a] threat to strike or picket is not a sham...simply because the threatened action would have violated a no-strike clause’”. *Laborers Int’l. Local No. 860 (Ronyak Paving)*, 360 NLRB No. 40, *17 (2014) (citing, *Electrical Workers Local 196 (Aldridge Electric)*, 358 NLRB No. 87, slip op. at 3 (2012); *Lancaster Typographical Union No. 70 (C.J.S. Lancaster)*, 325 NLRB 449, 450-451 (1998)). In a nutshell: “The existence of a no-strike clause does not diminish the threat”. *Operating Engineers Local No. 2*, 209 NLRB 673, 675 (1974).

Furthermore, on at least three separate occasions, IOE Local No. 18 made a competing claim for the work. On the first telephone call from Bob Mileski of TEI to IOE Local No. 18 Business Manager Don Taggart, Taggart stated: "...that anything with wheels, tracks, you know, that it was under Local 18's jurisdiction" (Tr. 121).¹⁷ *Local Union No. 71, Int'l. Brotherhood of Electrical Workers (Thompson Electric)*, 354 NLRB No. 46, 47 (2009). Second, Mr. Taggart's statement to Mr. Mileski to shift TEI IBEW Local No. 71 employees to the payroll of the prime contractor, Anthony Allega Cement Contractor, Inc., wherein they could then be remitted the wages and fringe benefits of the IOE Local No. 18 labor contract was a competing claim for the work. See, *Glass, Molders, Pottery, Plastics & Allied Workers (Olympian Precast)*, 333 NLRB 92 (2001) (general contractor unions' statement to subcontractor "...that if Olympian 'hired people out of our hall to do your warranty work that would make this grievance go away'" was a direct claim for the work); *Operating Engineers Local 150 (R&D Thiel)*, 345 NLRB 1137, 1139 (2005) ("Operating Engineers also asked R&D Thiel to sign a memorandum of agreement stating that it would use Operating Engineers-represented employees to operate cranes when hoisting material onto buildings. Accordingly, we find that there are competing claims to the disputed work"); *Laborers Int'l. Local No. 860 (Ronyak*

¹⁷ Mr. Taggart was not summoned to testify on behalf of IOE Local No. 18 at the section 10(k) hearing, and his absence creates an evidentiary presumption against IOE Local No. 18. *Seedorff Masonry, Inc.*, 360 NLRB No. 107, *2 (2014); *Galesburg Construction*, 267 NLRB 551, 552 (1983); *Van Haaren Spec. Carriers*, 247 NLRB 1185, 1191 (1980). In point of fact, even if hypothetically opposed in some form or fashion, Mr. Mileski's under-oath recounting of his conversations with IOE Local No. 18's District Representative Don Taggart sufficed to establish the requisite section 10(k) evidence. "In §10(k) proceedings, a conflict in testimony does not prevent the Board from finding evidence of reasonable cause and proceeding with the determination of the dispute". *J.P. Patti Co.*, 332 NLRB 830, 832 (2000). "The Board need not rule on the credibility of testimony in order to proceed to the determination of a 10(k) dispute because the Board need only find reasonable cause to believe that the statute has been violated". *IBEW Local No. 363 (U.S. Infosys)*, 326 NLRB 1382, 1383 (1998).

Paving), 360 NLRB No. 40, n. 3 (2014) (“Russell suggested to Petersen that the [prime contractor] grievance could be resolved if the Employer signed up two of its employees represented by Laborers as employees represented by Operating Engineers” is a competing claim for the work). That fringe benefit contributions would be remitted to IOE Local 18 funds (Tr. 124) is a blatant claim for the work. “[A]t its core, a jurisdictional dispute is a dispute over who shall be paid for the work”. *IOE Local No. 150 (The Austin Co.)*, 296 NLRB 938, 939 (1989). Finally, Mr. Taggart’s demand that TEI sign a project labor agreement with IOE Local No. 18 (Tr. 126-127) was a competing claim for the work. *IBEW Local No. 702 (F.W. Electric)*, 337 NLRB 594, 595 (2002) (“...one sure way this dispute would be resolved was for F.W. Electric to become signatory to the Laborers’ agreement” was a direct claim to subcontractor for the work); *So. Reg. Council of Carpenters (Standard Drywall)*, 346 NLRB 478, 480 (2006) (“That he would like the Employer ‘to come back and sign with Local 200 [Plasters]’” is competing claim for the work).

In a motion to quash presented to the NLRB Hearing Officer on the day of the §10(k) hearing, IOE Local No. 18 argued for the application of *Capitol Drilling Supplies* and its progeny wherein a union’s peaceful grievance against a general contractor alleging breach of a no-subcontracting clause was deemed not to be a “competing claim” sufficient to trigger §10(k).¹⁸ *Laborers’ Int’l. Union (Capitol Drilling Supplies)*, 318

¹⁸ This is an all-too-familiar tactic invoked by IOE Local No. 18 when confronted with §10(k) evidentiary hearings. *Laborers Int’l. Local No. 265 (Henkels & McCoy)*, 2014 NLRB LEXIS 550 (July 14, 2014); *Int’l. Operating Engineers Local No. 18 (Donley’s, Inc.)*, 360 NLRB No. 113 (May 15, 2014); *Laborers Int’l. Local No. 860 (Ronyak Paving)*, 360 NLRB No. 40 (Feb. 12, 2014). On each occasion, the Board has rejected IOE Local No. 18’s *Capitol Drilling* defense. *Id.*

NLRB 809, 811 (1995). *Capitol Drilling*, however, is no statutory sanctuary for IOE Local No. 18:

The Board found that a true jurisdictional dispute arises when a union seeking enforcement of a contractual claim not only pursues its contractual remedies against the employer with which it has an agreement, but also makes a claim for the work directly to the subcontractor that is assigned the work. In such circumstances, the Board stated that it would find truly competing claims in the use of threat or coercion to enforce a claim by a representative of either group of employees would be sufficient to trigger an 8(b)(4)(D) allegation and consequent 10(k) proceeding.

J.P. Patti Co., 332 NLRB 380, 381 (2000). Indeed, *Capitol Drilling* itself cautioned that it would have no application as defensive precedent where, as here, a grievance-filing union presses its claim directly to the separate subcontractor. *Laborers Int'l. Union (Capitol Drilling Supplies)*, 318 NLRB 809, 811 (1995) ("Under our holding today, seeking a Board award of work through a 10(k) proceeding will no longer be an option for the beneficiaries of the contract breach *unless the bargaining representative of the employees of the general contractor expands its contractual dispute by making a direct claim to the subcontractor for assignment of the work...*") (emphasis added). See also, *Iron Workers Local 1 (Goebel Forming)*, 340 NLRB 1158, 1160 (2003) ("Iron Workers' Steward Austin met with [subcontractor] Goebel Superintendent Day and stated that the embed work was Iron Workers' work. Iron Workers thereby made a direct claim to the subcontractor for the disputed work").

With each and every §10(k) factor established in this record, the Board must formally designate assignment of the work in dispute. "Section 10(k) requires the Board to make an affirmative award of the disputed work after considering various factors". *Laborers Int'l. Union Local No. 860 (Ronyak Paving)*, 360 NLRB No. 40, *19 (Feb. 12,

2014) (citing, *NLRB v. Electrical Workers IBEW Local 1212 (Columbia Broadcasting)*, 364 U.S. 573, 577, 81 S. Ct. 330 (1961)).

B. The Relevant §10(k) Factors Warrant Awarding the Disputed Work to IBEW Local No. 71.

1. Collective Bargaining Agreements.

TEI has had in place an IBEW Local No. 71 collective bargaining relationship for Foremen, Operators, Equipment Operators, Traffic Signal/Lighting Journeymen, and Groundmen to run all of the equipment needed to remove and install highway lighting in Northeast Ohio going back over twenty years (Tr. 57-58, 75, 147). The TEI/IBEW Local No. 71 labor contract has specific work classifications and wage rates for ODOT highway lighting install work (Tr. 57-58; Co. Exh. “A”, pp. 9-10).

The IOE Local 18/OCA labor contract to which Allega has assented¹⁹ also has specific job classification and wage rates for “Lighting and Traffic Signal Installation Equipment” (Co. Exh. “C”, p. 49).²⁰

Thus, the labor agreements, in and of themselves, afford neither union with a §10(k) advantage.

2. Employer Preference and Past Practice.

TEI prefers to use IBEW Local No. 71 members with which it has had a twenty-six year, peaceful collective bargaining relationship (Tr. 46, 78, 131). For at least twenty consecutive years, TEI has used IBEW Local No. 71 classified workers to operate all of the equipment and machinery needed to install and remove highway lighting in

¹⁹ Co. Exh. “B”; Jt. Stip. 1, ¶ 9.

²⁰ The fact that the OCA/IOE Local No. 18 collective bargaining agreement contains specific wage rates for skid steers and tractors does not afford it a §10(k) analytical advantage. *Laborers Int’l. Union Local 860 (Ronyak Paving)*, 360 NLRB No. 40, n. 8 (2014).

Northeast Ohio (Tr. 58-62, 75, 131, 145, 147). Just this 2014 year, TEI has used IBEW Local No. 71 members to operate all of the equipment on numerous highway and street lighting and traffic installation projects jurisdictioned in Northeast Ohio (Tr. 74-75).

In contrast, there is no record evidence of IOE Local No. 18 operating *any* piece of equipment for purposes of installing highway lighting or traffic signals in Ohio, let alone the Northeast Ohio area (Tr., *passim*).

3. Area and Industry Practice.

Mr. Bryan Stage, the IBEW Local No. 71 Business Manager, testified that since at least 1999 his members have operated the equipment needed to install and remove highway and roadway lighting and signalization units in the five Ohio counties of Lake, Cuyahoga, Geauga, Lorain, and Ashtabula (Tr. 146-147, 152). Mr. Stage worked as an IBEW Local No. 71 classified Groundmen on many of these lighting install projects (Tr. 143-144, 170, 177-178).

In contrast, IOE Local No. 18 did not offer any evidence of ever having operated the types of equipment used to install highway or roadway lighting or traffic signals (Tr., *passim*). Area and industry practice favors an award of the operation of skid steers, derrick-diggers, backhoes, trenchers, mini-excavators, and all other lighting install removal equipment to IBEW Local No. 71 members.

4. Relative Skills and Training.

IBEW Local No. 71 sends each of its apprentices to a three week specialized training facility in Medway, Ohio known as ALBAT (“American Line Builders Apprenticeship Training”) (Tr. 172-173). This third-party apprenticeship training teaches

each trainee in electrical theory²¹ as well as the tools and equipment used to install highway lighting and traffic signals (*Id.*). There are three days of training dedicated to proper and safe use of digger-derricks (Tr. 182-184). Eventually following a 7,000 hour, 3 year on-the-job apprenticeship training venture, a formal certificate from the National Certification Commission of Crane Operations is obtained (Tr. 187-188). What's more, IBEW Local No. 71 members who operate the heavy duty dump trucks used to move lighting install equipment to and on a highway construction project have Commercial Driver Licenses ("CDL") (Tr. 188-190).

Again, because IOE Local No. 18 chose not to summon a single witness to the §10(k) hearing, there is a dearth of evidence that any special skills are acquired by IOE Local No. 18 members with regard to highway lighting install equipment, or commercial over-the-road trucks CDL's (Tr., *passim*).

5. Economy and Efficiency.

Larry Thompson and Bob Mileski of TEI both testified that IBEW Local No. 71 members, whether they be Operators, Equipment Operators, Traffic Signal/Lighting Journeymen, or Groundmen, perform a host of labor intensive tasks and duties when they are not operating lighting/traffic install equipment (Tr. 58-61, 78, 80, 81, 131-132). The operation of equipment only lasts 2 to 3 hours per day on a highway project (Tr. 81, 131). IOE Local No. 18 Operating Engineers do not, and will not perform manual labor or tasks (Tr. 81). "In these circumstances, the Board has found that the factor of economy and efficiency of operations favors awarding the disputed work to the more versatile employees". *Int'l. Union Operating Engineers Local 18 (Donley's, Inc.)*, 360

²¹ There are ever-present electrical hazards from overhead transmission and distribution power lines in highway construction work (Tr. 182).

NLRB No. 113, *28 (2014); *Laborers Int'l. Union Local No. 860 (Ronyak Paving)*, 360 NLRB No. 40, **27-28 (2014); *IBEW Local No. 196 (Aldridge Elect.)*, 358 NLRB No. 87, *19 (2014).

There is more! The particular work at the ODOT I-90 Lake County, Ohio highway project requires the lighting install employees to work four, ten hour days (Tr. 61). Under the TEI/IBEW Local No. 71 collective bargaining agreement no overtime is owed for merely working in excess of 8 hours in a day (Tr. 62, 179; Co. Exh. "A", pp. 7-8). In contrast, under the IOE Local No. 18/Allega labor agreement, time-and-one-half overtime is due anytime a member employee works in excess of 8 hours in a day (Co. Exh. "C", pp. 29-30, ¶ 55). Additionally, an apples-to-apples hourly wage rate comparison for Operating Engineers and Electricians on highway construction projects demonstrates that Operating Engineers wage rates exceed that of IBEW Local No. 71 members (Co. Exh. "A", pp. 9-10; Co. Exh. "C", p. 49).²²

C. The Appropriate and Required Remedy is an Area-Wide Award.

IOE Local No. 18 has already demonstrated just this 2014 year that it is engaged in a widespread and persistent campaign to expand its work jurisdiction over any piece of construction equipment mobilized by tracks or tires.²³ *Laborers' Union Local No. 894*

²² The 2014 wage rate for IOE Local 18 members operating highway or traffic installation equipment is \$33.83 per hour, whereas IBEW Local No. 71 Equipment Operators and Operators earn \$32.94 per hour and \$29.65 per hour respectively (Co. Exh. "A", pp. 9-10; Co. Exh. "C", p. 49). IBEW Local No. 71 Groundmen for the year 2014 earned anywhere from \$19.76 per hour - \$23.96/hour.

²³ "[A]nything with wheels, tracks, you know, that it was under Local 18's jurisdiction" (Tr. 121). See also, *Local Union No. 71 IBEW (Thompson Elec.)*, 354 NLRB 344, 345 (2009) ("Jeffries told [Larry] Thompson that the disputed work on the job site is clearly Operating Engineers' work, and that such work belonged to members of the Operating Engineers if it involves 'rubber tires or tracks'").

(*Donley's, Inc.*), 360 NLRB No. 20 (Jan. 10, 2014); *Laborers' Union Local No. 860 (Ronyak Paving)*, 360 NLRB No. 40 (Feb. 12, 2014); *Int'l. Union of Operating Engineers Local No. 18 (Donley's, Inc.)*, 360 NLRB No. 113 (May 15, 2014); *Laborers' Int'l. Union Local No. 265 (Henkels & McCoy)*, 2014 NLRB LEXIS 550 (July 14, 2014); *Laborers' Int'l. Union Local No. 265 (Henkels & McCoy)*, 2014 NLRB LEXIS 337 (May 5, 2014). In each of its 2014 §10(k) hearings, IOE Local No. 18 has staked its claim in the Northeast Ohio area to the very same pieces of construction equipment involved in this dispute, including skid steers, forklifts, tractors, and mini-excavators. *Id.* Furthermore, on each occasion IOE Local No. 18 has employed the same leveraging tactics in an effort to coerce the assignment of the work, including a demand that the subcontractor request that its employees resign their existing employment, and obtain employment with the prime contractor,²⁴ and pursuing “pay in lieu of work” grievances,²⁵ all the while denying in §10(k) proceedings that it has made a claim for the disputed work. Through this orchestrated campaign, IOE Local No. 18 has literally monopolized NLRB Region 8’s time by forcing the Board to hold §10(k) hearing, after §10(k) hearing, after §10(k) hearing which mandates expedited consideration.

In *Int'l. Union of Operating Engineers Local No. 18 (Donley's Inc.)*, 360 NLRB No. 113 (2014), the Board decided enough was enough and issued an area-wide award against IOE Local No. 18. In its analysis, the Board stated that the element of proclivity is demonstrated where a “second case...occurred after the issuance of the determination in [a] first case”. *Id.* at *31 (citing, *Glaziers Dist. Council No. 16 (Service*

²⁴ *Laborers Int'l. Union Local No. 860 (Ronyak Paving)*, 360 NLRB No. 40, n. 3 (2014).

²⁵ *Laborers Int'l. Union Local No. 265 (Henkels & McCoy)*, 2014 NLRB LEXIS 550, *4 (2014); *Laborers Int'l. Local No. 894 (Donley's, Inc.)*, 360 NLRB No. 20, n. 3 (2014).

West), 357 NLRB No. 58, slip. op. at 3 (2011)). This dispute comes on the heels of an identical dispute involving the same parties and parties-in-interest. See, *Local Union No. 71, Int'l. Brotherhood of Electrical Workers (Thompson Elec.)*, 354 NLRB No. 46 (2009). In point of fact, the Board issued an area-wide award against IOE Local No. 18 in *Donley's, Inc.* without a pre-existing §10(k) award against Operating Engineers Local 18 because the mere conduct by IOE Local No. 18 in that case demonstrated the requisite proclivity. *Id.* at *32.

With the proclivity factor well-established here, TEI only needs to demonstrate that assignment of the work in question "...will likely continue to be controversial". *Id.* at *30. That factor is clearly present in this case, as it was present in the multiple 2014 §10(k) cases implicating IOE Local No. 18. Since both labor contracts (Allega and TEI) have comparable classifications and classification wage rates for those operating equipment on highway lighting and traffic signalization construction projects, the labor agreements in and of themselves prove that this very controversy is likely to reoccur again and again. Additionally, TEI intends to perform the same exact services in Northeast Ohio on behalf of Allega Concrete Construction Company, an employer that has qualifiedly assented to the OCA/IOE Local No. 18 collective bargaining agreement.

Finally, it is important for the Board to take into account that the work in dispute, and at issue here was an ODOT state-funded construction project wherein tax payers monies are in play (Tr. 82). See, *IOE Local No. 150 (The Austin Company)*, 296 NLRB 938, 941 (1989) ("Because the Board carries out its mandate of protecting employers *and the public* from the detrimental economic impact of jurisdictional dispute..."). The profit margins on public construction projects are extremely thin on these sorts of

competitively bid worksites, and only the “best and lowest” bidder ultimately achieves the work (*Id.*). The potential for profit of a responsible bidder is all but wiped out where, as here, IOE Local No. 18 falsely insists that it has no interest in the work in question, drags collective bargaining partners through the expensive §10(k) process, fails to summon forth a single witness to support its position, and uses a cookie-cutter approach to litigating its §10(k) defenses.²⁶ The Board strives to “...assure[] achieve a “...permanent resolution of ...disputes”. *IOE Local No. 150 (The Austin Co.)*, 296 NLRB 938, 941 (1989).

III. CONCLUSION.

For the foregoing reasons, there is reasonable cause to believe that §8(b)(4)(D) of the National Labor Relations Act has been violated with respect to this dispute, and the NLRB should affirmatively, and permanently award the work in question to members of IBEW Local No. 71. Additionally, because both the “proclivity” and “likely to reoccur” factors are clearly present, a limited area-wide award should be issued with respect to an award of the work in the Northeast Ohio counties of Lake, Cuyahoga, Geauga, Lorain and Ashtabula, Ohio.

²⁶ The cookie-cutter approach by IOE Local No. 18 includes filing boilerplate motions to quash, exacerbating the hearing length through spurious “due process” notice allegations, and not marshalling any evidence. See, *Laborers Int’l. Local No. 894 (Donley’s, Inc.)*, 360 NLRB No. 20, **11-13 (2014) (due process notice claims raised and rejected); *Int’l. Union of Operating Engineers Local No. 18 (Donley’s, Inc.)*, 360 NLRB No. 113, n. 5 (2014) (due process notice raised and rejected); *Int’l. Union of Operating Engineers Local No. 18 (Donley’s, Inc.)*, 360 NLRB No. 113, **17-19 (2014) (motion to quash rejected); *Int’l. Operating Engineers Local No. 18 (Donley’s, Inc.)*, 360 NLRB No. 113, n. 8 (2014) (wherein IOE Local No. 18 failed and refused to call its chief negotiator to the §10(k) hearing).

Respectfully submitted,

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I hereby certify that the forgoing Thompson Electric, Inc.'s Post-Hearing Brief was served this 3rd day of November, 2014 upon the following:

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